Supreme Court, U.S.
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No. 99-____

IN THE
Supreme Court of the United States

AT&T CORP. AND
MCI WORLDCOM NETWORK SERVICES, INC.,
Petitioners,

v.

CINCINNATI BELL TELEPHONE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996 ("the Act"), Congress for the first time enacted detailed provisions governing "universal service," which for decades has been understood to mean the policy of subsidizing local telephone service. In implementing the Act, the Federal Communications Commission ("FCC") ruled that the contributions of telecommunications carriers to certain federal universal service programs would be calculated on the basis of those carriers' revenues from intrastate as well as interstate services. That determination was overturned by the Fifth Circuit on the ground that the Act's universal service provisions do not "apply" to intrastate matters. The question presented is:

Whether, given the plain terms of the Act, decades of regulatory history, and this Court's decision in *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721 (1999), the FCC has authority to consider a carrier's intrastate operations and revenues in implementing federal programs designed to ensure universally available local telephone service.

PARTIES

The following were parties to the proceeding before United States Court of Appeals for the Fifth Circuit:

Petitioners

Texas Office of Public Utility Counsel
Celpage, Inc.
Southwestern Bell Telephone Company
GTE Companies
PanAmSat Corporation
Louisiana Public Service Commission
COMSAT Corporation
People of the State of California and
California Public Utilities Commission
Iowa Utilities Board
South Dakota Public Utility Commission
Pennsylvania Public Utility Commission
Bell Atlantic Telephone Companies
Vermont Department of Public Service
Public Service Commission of Nevada
Cincinnati Bell Telephone Company
Florida Public Service Commission
BellSouth Corporation and BellSouth
Telecommunications, Inc.
Public Service Commission and People of
the State of New York
State Corporation Commission of Kansas

Respondents

Federal Communications Commission
United States of America

Intervenors

Ad Hoc Telecommunications Users Committee

AirTouch Communications
Alliance for Community Media
Amana Society Services Co.
America's Carriers Telecommunications Association
American Library Association
Ameritech Corporation
Association for Local Telecommunications Services
AT&T Corp.
Bay Springs Telephone Co.
Benton Foundation
Center for Media Education
Citizens Telephone Co. of Hammond, NY
Clements Telephone Co.
Comcast Cellular Communications, Inc.
Commonwealth of the Northern Mariana Islands
Competition Policy Institute
Consumer Action
Crockett Telephone Co.
Doylestown Telephone Co
Edgemont Neighborhood Coalition
Education and Library Networks Coalition
Electronic Data Systems Corporation
Elkhard Telephone Co.
Frontier Corporation
Global Village Schools Institute
Granby Telephone Co.
Hickory Telephone Co.
Home Telephone Co. of Nebraska
Hot Springs Telephone Co.
Information Technology Association of America
Information Technology Industry Council
Ironton Telephone Co.
Jefferson Telephone Co.
Laurel Highland Telephone Co.
Legal Aid Society of Dayton

Mankatao Citizens Tel. Co.
McClure Telephone Co.
MCI Telecommunications Corporation
Mid Communications Tel. Co.
Midstate Telephone Co.-ND
Migrant Legal Action Program
Motorola, Inc.
National Association for Migrant Education
National Association of State Utility
Consumer Advocates
National Cable Television Association
National Emergency Number Association
National Rural Telecommunications Association
National Telephone of Alabama, Inc.
New Jersey Division of the Ratepayer Advocate
Nova Telephone Co.
OPASTCO
Orion Network Systems, Inc.
Orwell Telephone Co.
Pennsylvania Telephone Co.
Peoples Telephone Co., Inc
Pronet, Inc.
Puerto Rico Telephone Company
Redwood County Telephone Co.
Roanoke Telephone Co., Inc.
Ronan Telephone Co.
Rural Telephone Coalition
Schaller Telephone Co.
Southern New England Telephone Company
Sprint Corporation
Sprint Spectrum L.P.
State Long Distance Tel. Co.
Sycamore Telephone Co.
Telecommunications Resellers Association
United States Catholic Conference

United States Telephone Association
US West, Inc.
Vanguard Cellular Systems, Inc.
Volcano Telephone Co.
Washington Legal Clinic for the Homeless
West Tennessee Telephone Co., Inc.
Western Alliance
WorldCom, Inc.
Yukon-Waltz Telephone Co.

PETITIONERS' PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.6 of the Rules of this Court, petitioner AT&T Corp. states that it has no parent company. AT&T Corp. has the following nonwholly owned subsidiaries:

Ace Limited
Adelphia Communications Corp.
ACTV, Inc.
ALESTRA
American Mobile Satellite Corporation
ANTEC Corporation
A/O Telmos (Russia)
AT&T Credit Holdings, Inc.
At Home Corporation
Cablevision Systems Corporation
CanTV
Cendant Corporation
CGS Systems International, Inc.
Comverse Technologies, Inc.
Dallas Semiconductor
General Instruments Corporation
Goldnet

ISS Group, Inc.
Lanser Wireless Inc.
Liberty Media Corporation
One Waterfront Plaza Partners
Speed Cellular Systems Company
Sportsline USA, Inc.
TCI Music, Inc.
Telebase Systems
The Associated Group, Inc.
TV Guide, Inc.
Unitel Communications Holdings, Inc.
Unitel Newfoundland
Uniworld
USA Networks, Inc.
Utel (Ukraine)
Western Investors Technology Group, L.P.
WITG, Inc.
Venture Fund I
Venture Fund II

Pursuant to Rule 29.6 of the Rules of this Court, petitioner MCI WORLDCOM Network Services, Inc., states that it was formerly known as MCI Telecommunications Corp. MCI WORLDCOM Network Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM, Inc. MCI WORLDCOM Network Services, Inc. has the following nonwholly owned subsidiaries:

Darome Teleconferencing L.L.C.
MCI Network Technologies, Inc.
MCI WORLDCOM Capital Management Partners
Pittsburgh Fiber
Proceda Tecnologia e Informatica, S.A.
WorldCom Purchasing, L.L.C.

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PETITION FOR WRIT OF CERTIORARI

Petitioners AT&T Corp. ("AT&T") and MCI WORLDCOM Network Services, Inc. ("MCI WORLDCOM") respectfully petition for a writ of certiorari to review one aspect of the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-115a) affirming in part, reversing in part, and remanding in part the order of Federal Communications Commission (FCC) is reported at 183 F.3d

393. The *Report and Order* of the Federal Communications Commission *In the Matter of the Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997) ("*Order*"), is too voluminous to be reproduced in its entirety. For the convenience of this Court, only those sections which Petitioners believe germane to the question presented are reproduced in the Appendix, Pet. App. 119a-249a. Celpage, Inc. has filed a petition for writ of certiorari to review another aspect of the same decision. *Celpage, Inc.* v. *Federal Communications Commission*, No. 99-1072 (filed December 23, 1999).

JURISDICTION

The court of appeals entered its original decision on July 30, 1999. The court denied petitions for rehearing *en banc* on September 28, 1999. On December 21, 1999, this Court extended to January 26, 2000, the time allowed to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are 47 U.S.C. §§ 151, 152(b), 201, 251, 252, & 254, as amended by the Telecommunications Act of 1996. These provisions are produced in the Petitioners' Appendix at 250a-273a.

STATEMENT OF THE CASE

This case arises under the landmark Telecommunications Act of 1996 ("1996 Act"), Pub. Law No. 104-104, 110 Stat. 56 (1996), and concerns the decades-old policy of "universal service" -- *i.e.*, the policy of promoting universally available *local* telephone service. Although the FCC has maintained

programs to promote universal service for decades, Congress enacted detailed provisions to govern such programs for the first time in the 1996 Act. 47 U.S.C. § 254. The new Section 254 expressly authorizes the Federal Communications Commission ("FCC") to maintain a system of subsidies to keep local service affordable and available throughout the nation. The universal service mechanisms under Section 254 collect and dispense billions of dollars in subsidies every year, and affect virtually every telephone user in the nation as either a payor or recipient of those subsidies.

In the decision below -- the first judicial interpretation of Section 254 -- the Fifth Circuit adopted restrictive interpretations of these important provisions, interpretations that threaten to undermine the entire program. In particular, the Fifth Circuit broadly held that the FCC has no "jurisdiction" over any intrastate matters under Section 254. Contrary to this Court's recent jurisdictional decision in *AT&T Corp.* v. *Iowa Utilities Board*, 119 S.Ct. 721 (1999), the court concluded -- in defiance of decades of regulatory history and the plain text of the Act -- that Section 254 could not be held to "apply" to intrastate (*i.e.*, local) services under the rule of construction of Section 2(b) of the Act. Accordingly, the court concluded that the FCC is prohibited by Section 2(b) of the Communications Act (47 U.S.C. § 152(b)) from even considering a carrier's intrastate operations and revenues in determining how that carrier should be treated for purposes of federal universal service programs. Pet. App. at 107a-110a. On the basis of these erroneous "jurisdictional" rulings, the court struck down the FCC's rule requiring interstate telecommunications carriers to contribute to certain parts of the federal universal service fund on the basis of their total telecommunications revenues (*i.e.*, both intrastate and interstate revenues). Pet. App. at 106a-110a.

In doing so, the Fifth Circuit substantially undermined one of the pillars of the universal service system. Because of the sheer size of that multibillion dollar system, Section 254 requires the funding mechanisms to be equitable, nondiscriminatory, and competitively neutral. The immediate effect of the Fifth Circuit's ruling, however, is to shift to AT&T, MCI WORLDCOM, and other long distance carriers hundreds of millions of dollars of annual subsidy obligations that, under the FCC's rule, would otherwise be shared equitably with other carriers that provide a larger percentage of intrastate services. The Fifth Circuit's decision thus prohibits the sort of broad-based, competitively neutral subsidy system that Congress envisioned when it enacted Section 254. Equally important, the Fifth Circuit's interpretation of Section 254 threatens the implementation and enforcement of numerous other provisions of Section 254 in the future. It also threatens to reduce overall funding for the universal service system, thereby undermining the states' ability to ensure that communications services are widely available to their citizens.

1. Universal Service Prior to the 1996 Act. For decades, the Federal Communications Commission ("Commission" or "FCC") has maintained a set of mechanisms that provide subsidies for local telephone rates. Designed to promote what has come to be known as "universal service," these mechanisms ensure that the maximum number of people can subscribe to local service and remain on the telecommunications network.

The universal service policy underlying these mechanisms was based on a directive contained in the original Communications Act. That legislation directed the FCC "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate

facilities at reasonable charges . . ." 47 U.S.C. § 151. Thus, as the FCC has often stated, "the traditional core goal of universal service has been to ensure that basic residential telephone service, which is primarily an intrastate service, is affordable." Pet App. 213a.

Indeed, the FCC's universal service mechanisms have never been concerned primarily with -- or limited to -- interstate matters. The concept of universal service can be traced to the early part of the 20th century, when the Bell system controlled virtually all long-distance (or "interexchange") telephone service, as well as most of the local exchange service in the nation. During that period, the Bell system adopted a number of measures designed to ensure that as many people as possible could obtain some form of local telephone service. Most of these measures took the form of implicit subsidies in which rates for long distance services and lower-cost urban and business customers were inflated to offset the higher cost of providing service in rural and suburban areas.

Over the years, the FCC adopted increasingly specific programs to perpetuate these policies. In 1970, for example, the FCC adopted the so-called Ozark Plan in which, pursuant to the established "separations" process, the FCC assigned costs that all parties agreed were intrastate costs to the interstate jurisdiction, for recovery in interstate rates.[1] The FCC did so for the express purpose of creating a subsidy from

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[1] Ever since *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 150-51 (1930), it has been understood that the costs of telecommunications facilities must be "separated" according to the relative use of those facilities for intrastate and interstate calls. Accordingly, the FCC, acting in conjunction with a Federal-State Joint Board pursuant to 47 U.S.C. §§ 221(c) & 410, has undertaken to separate those costs and assign them to the intrastate and interstate jurisdictions, where they are then included in separate rate bases regulated by the state and federal commissions.

interstate services to intrastate services (and in so doing effectively regulated both intrastate and interstate rates). See Huber, Kellogg & Thorne, *Federal Telecommunications Law* 133 (2d. ed. 1999). By 1980, approximately 25 percent of the cost of local facilities was assigned to the interstate jurisdiction, even though interstate calls represented only about 8 percent of the usage of those facilities. *Id.*

Courts upheld these arrangements even though they were arguably at odds with the traditional understandings of the jurisdictional boundaries between the FCC and the states. Indeed, MCI WORLDCOM later argued to the D.C. Circuit "that the FCC has no responsibility to promote universal service because 'the Commission has no statutory responsibility for local communications,' and therefore 'it would be unlawful for it to promulgate a policy designed to . . . benefit local communications.'" *NARUC* v. *FCC*, 737 F.2d 1095, 1108 n.6 (D.C. Cir. 1984). The D.C. Circuit rejected the argument. It noted that "Congress directed that, 'so far as possible, . . . *all* people of the United States' are to have adequate telephone facilities at reasonable prices." *Id.* (quoting 47 U.S.C. § 151); see also *MCI Telecommunications Corp.* v. *FCC*, 750 F.2d 135, 140-41 (D.C. Cir. 1984) (rejecting challenge under *Smith* to interim freeze of inflated allocation of local costs to interstate jurisdiction).

The FCC continued these implicit universal service subsidies in the 1980s when, in connection with the break-up of AT&T, the FCC created a system of "access charges" to be paid by all long distance carriers to the newly created local exchange carriers or "LECs."[2] Access charges were designed

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[2] *MTS and WATS Market Structure (Phase I), Third Report and Order*, 93 F.C.C. 2d 241, 341 (¶ 369)(1983), *modified on recon.*, 97 F.C.C.2d 682 (continued...)

to compensate the LECs for the portion of a long distance call that travels over local facilities, *i.e.*, between the calling (or receiving) customer's premises and the long distance carrier's point of interconnection with the LEC.[3] In setting those charges, however, the FCC maintained the inflated allocation of local costs to the interstate jurisdiction. As a result, these access charges were set well in excess of the LECs' economic costs. Accordingly, access charges provided an implicit subsidy intended to fund the traditional universal service objective of wide-spread availability of reasonably-priced local telephone service.[4]

The FCC also created additional mechanisms to promote universal service and made explicit some of the subsidies that had previously been implicit in the Bell system pricing structure. For example, the FCC created the "high cost fund" and Long Term Support mechanisms,[5] which were directed at

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[2] (...continued)
(1983), *modified on further recon.*, 97 F.C.C.2d 834 (1984), *aff'd in principal part and remanded in part, NARUC* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *modified on further reconsideration*, 99 F.C.C.2d 708 (1984), 101 F.C.C.2d 1222 (1985), *aff'd on further reconsideration*, 102 F.C.C.2d 849 (1985).

[3] *Id.* at 242-244 (¶¶ 1-7).

[4] Kahn & Shew, *"Current Issues in Telecommunications Regulation: Pricing,"* 4 Yale J. on Reg. 191, 194-95 (1987). In addition to these subsidies, subsidies were also present in the rates charged for optional services such as touch tone, in the process of averaging rates over large geographic areas, and in other features of the pre-1996 regulatory regime. Pet. App. 134a.

[5] *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order*, 96 F.C.C.2d 781, 795 (¶ 30) (1984) (*"Amendment of Part 67"*). This fund existed for carriers whose costs for local (continued...)

increasing local subscribership in high-cost areas. It also created the Lifeline and Link Up programs,[6] which were designed to make local service more affordable for low-income consumers. Pet. App. 133a-134a. All long distance carriers were required to contribute to these various funds, even though they subsidized only local rates.[7]

When Congress enacted the 1996 Act, it was legislating against this backdrop of decades of regulatory history. As this history shows, "universal service" has always been understood as a policy of keeping local, *i.e.* intrastate, telephone services affordable and accessible for as many subscribers as possible. See, *e.g.*, *NARUC* v. *FCC*, 737 F.2d 1095, 1108 & n.6 (D.C. Cir. 1984); 47 U.S.C. § 151. Moreover, the FCC, the states, and even the courts have always treated universal service as a unique area of regulation that, by reason of 47 U.S.C. § 151, necessarily transcends the traditional division of authority between the FCC and the state commissions.

2. The Telecommunications Act of 1996 and the *Order*. The 1996 Act represented the first major revision of the Communications Act since its original passage in 1934, and the first major revision of the substance of communications law since the enactment of the nineteenth-century Interstate Commerce Act on which the Communications Act was based.

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[5] (...continued)
lines exceeded 115 percent of the national average. Those carriers were permitted to allocate *even more* than 25 percent of those costs to the interstate jurisdiction, to be reimbursed by the fund.

[6] *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order*, 2 FCC Rcd. 2953, 2957-59 (¶¶ 27-44) (1987).

[7] *Amendment of Part 67*, 96 F.C.C.2d 781 at 811 (¶¶ 77-80).

In the 1996 Act, Congress for the first time expressly codified the policy of universal service and adopted detailed provisions to govern all such programs. 47 U.S.C. § 254.

The principal purpose of the 1996 Act was to create a set of duties and standards designed to encourage the development of competition in the local telephone market, which had previously been a state-protected monopoly. See *Iowa*, 119 S. Ct. at 726-27. As Congress realized, however, local competition threatened to undermine the existing universal service system. That system was founded mostly on implicit subsidies, which would be unsustainable in a competitive market. As the Fifth Circuit noted, "[i]n a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers." Pet. App. at 9a. To maintain universal service, Section 254 of the Act required the FCC to replace the patchwork of primarily implicit subsidies with funding mechanisms that will be sustainable in a competitive environment. 47 U.S.C. § 254(d).

Although Section 254 is complex, it contains three principal provisions. First, the FCC is directed to determine which services are to receive universal service support. 47 U.S.C. § 254(c). Second, the FCC is required to establish funding mechanisms that are "specific, predictable, and sufficient" to "preserve and advance universal service." 47 U.S.C. § 254(d). Third, the FCC is also directed to establish a new, special fund to subsidize telecommunications services for schools, libraries, and rural health care providers (colloquially known as the "e-rate" program). 47 U.S.C. § 254(c)(3), (d), & (h).

Moreover, to ensure that the States have adequate input into the FCC's implementation of Section 254, Congress directed that these issues be addressed in the first instance by a Federal-State Joint Board. Accordingly, before issuing the rule at issue here, the FCC convened a Joint Board, which by statute consists of representative regulatory commissioners from four states and one state consumer advocate, joined by three members of the FCC itself. See 47 U.S.C. § 254(a)(1). In its *Recommended Decision*, the Joint Board proposed a number of changes to existing the universal service system, including the rule at issue here. The FCC largely adopted the Joint Board's recommendations in the *Order*. Pet. App. 159a-171a.[8]

For each of the explicit, statutory universal service funds, the FCC made two determinations. First, it decided on what basis interstate carriers will pay into these funds. This is known as the "assessment base." Second, the FCC decided how carriers will be permitted to recover those contributions from their customers. This is the "recovery base." See Pet. App. 207a-208a.

With respect to the new fund for subsidizing schools, libraries, and rural health care providers (see 47 U.S.C. § 254(h)), the Joint Board recommended and the Commission agreed that the assessment base should be total telecommunications revenues. In other words, all interstate telecommunications carriers would pay a percentage of their

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[8] The Joint Board also recommended, and the FCC adopted, "competitive neutrality" as a principle to govern the universal service pursuant to 47 U.S.C. § 254(b)(7). *See* Pet. App. 163a. The FCC defined competitive neutrality as the rule that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another." *Id.*

total revenues -- both interstate and intrastate -- to the fund. Consistent with its understanding of the proper division of jurisdiction between itself and the States, however, the Commission decided that the *recovery* base would be limited to interstate revenues. Thus, even though the carriers' *contribution* to the fund would be calculated as a percentage of their total revenues, they could *recover* those contributions only through interstate charges. See Pet. App. 231a-235a. Thus, charges for intrastate services would be unaffected by the carriers' required contributions.[9]

In its *Order*, the FCC explained at length that these decisions did not implicate Section 2(b) of the Communications Act, 47 U.S.C. § 152(b). That section provides that nothing in the Act "shall be construed to apply or give the Commission jurisdiction with respect to charges . . . for or in connection with intrastate communications service." Pet. App. 218a. As the Commission noted, using total revenues as part of the assessment base calculation did not require any local carrier to change any intrastate rates, terms of service, or aspect of its business and so "does not constitute rate regulation of [intrastate] services or regulation of those services so as to violate section 2(b)." *Id.*

Moreover, the FCC explained that "to the extent that commenters assert that the Communications Act generally divides the world into two spheres -- Commission jurisdiction over interstate carriers and interstate revenues and state jurisdiction over intrastate carriers and intrastate revenues -- section 254 blurs any perceived bright line between interstate

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[9] With respect to the other explicit universal service fund, which supports high-cost areas of the nation, the Commission decided to designate interstate and international telecommunications revenues as the assessment base. *See* Pet. App. 158a-59a.

and intrastate matters." Pet. App. 220a. As the Commission noted, Section 254(d) requires the FCC to ensure that there are *federal* mechanisms "sufficient" to preserve universal *local* service. By contrast, Section 254(f) merely permits the state commissions to establish supplemental funds that do not "rely on or burden" the federal funds. Pet. App. 210a-218a. In these respects, the division of authority between the FCC and the state commissions under Section 254 differs little, if any, from the situation under the pre-1996 Act.

3. The Decision Below. During the proceedings below, none of the participating state commissions challenged the FCC's decision to include intrastate revenues in the assessment base of the e-rate fund. However, Respondent Cincinnati Bell challenged that decision as a violation of Section 2(b). On July 30, 1999, the Fifth Circuit upheld most of the FCC's *Order*, but reversed, *inter alia*, the FCC's determination that it had the authority, consistent with Section 2(b), to include intrastate revenues in the assessment base for universal service funds.

The Fifth Circuit acknowledged that this Court had rejected an identical argument in *Iowa*, on the grounds that "§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies," even if those matters are intrastate in nature. Pet. App. 50a (quoting *Iowa*, 119 S. Ct. at 730). The Fifth Circuit found, however, that "the FCC must show that the meaning of a statutory provision *applies* to intrastate matters in an 'unambiguous and straightforward' manner as 'to override the command of § 2(b).'" Pet. App. 50a. (quotations omitted).

On that question, the Fifth Circuit recognized that this Court had found that Congress has "unquestionably" "taken the regulation of local telecommunications competition away from the States" for "the matters addressed by the 1996 Act," *Iowa*,

119 S. Ct. 730 n.6. Nonetheless, expressing some dissatisfaction with this Court's opinion, the Fifth Circuit asserted that this Court "did not further explain why it felt §§ 251 and 252 'unquestionably' applied to intrastate matters." Pet. App. 52a. Accordingly, the Fifth Circuit concluded that "*Iowa Utilities* provides little guidance for resolving the question whether § 254 applies to intrastate services," Pet. App. 51a.

Although, as explained above, the term "universal service" has always been understood as a set of policies subsidizing local telephone rates, the Fifth Circuit went on to hold that Sections 254(d) and (f) did not "apply" to intrastate services because those provisions did not contain "enough of an unambiguous grant of authority to overcome" Section 2(b). See Pet App. 108a-110a. On the basis of this conclusion, the panel struck down the FCC's ruling that contributions to the e-rate universal service funds would be assessed against telephone carriers' revenues from intrastate services as well as their revenues from interstate services. See Pet App. 107a-114a.

The FCC and AT&T both sought rehearing en banc. The court of appeals denied rehearing on September 28, 1999. See Pet App. 116a-118a.

REASONS FOR GRANTING THE PETITION

The question presented in this case is of exceptional legal and practical importance. The universal service policies at issue ensure that the nation's telephone network is accessible to as many Americans as possible, and to schools, libraries, and rural health care providers, which makes the network more valuable for all users. The FCC's universal service programs

collect and dispense billions of dollars annually in subsidies, and affect virtually every telephone user in the nation as either a payor or beneficiary of subsidies. Moreover, the Telecommunications Act of 1996 was the first comprehensive overhaul of the nation's telecommunications policy since the adoption of the Communications Act of 1934. Section 254 in particular represents the first time Congress has adopted detailed provisions to govern universal service policies, and the Fifth Circuit's decision is the first judicial interpretation of those provisions.

Beyond that, as explained below, certiorari is warranted for two separate reasons. First, the Fifth Circuit's interpretation of Section 254 is a stark departure from its text, structure and regulatory history, and is contrary to this Court's decision in *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721 (1999). Second, the decision below has an enormous practical impact on the companies -- and customers of companies -- that must contribute to the FCC's subsidy programs, and on the FCC's ability to administer those programs in an equitable manner. At the same time, the decision below has a potentially adverse impact on the states because it will, over time, likely constrict the amounts available to subsidize intrastate rates.

1. The Fifth Circuit's decision is starkly at odds with the plain text, structure, and regulatory history of Section 254. As explained above, the Fifth Circuit held that the substantive provisions of Section 254 do not "apply" to intrastate matters, and therefore that under Section 2(b) of the Act the FCC had no authority to include intrastate revenues in the assessment base for the federal e-rate universal service funds. This was contrary to this Court's decision in *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721, 729-31 (1999).

In *Iowa*, this Court held that Section 2(b)[10] does not oust the FCC of jurisdiction over an intrastate matter if Congress clearly intended to grant the FCC rulemaking authority over that matter. See *Iowa*, 119 S. Ct. at 729-31; Pet. App. 108a-110a. *Iowa* involved provisions of the Act (§§ 251-52) that applied to "exchange" and "exchange access" service which, under the accepted meaning of these terms, included "intrastate services." The lower court held, and this Court agreed, that these provisions thus "applied" to intrastate services. However, Section 2(b) also provides that no provision of the Act may be "construed" to "give the Commission jurisdiction" over intrastate services. In *Iowa*, the lower court had held that Section 2(b) barred FCC rulemaking authority over intrastate matters unless the substantive provision at issue explicitly granted the FCC such jurisdiction.

This Court reversed. It explained that "[t]he fallacy in [the lower court's] reasoning is that it ignores the fact that § 201(b) [of the Act] *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Iowa*, 119 S. Ct. at 730. In particular, § 201(b) expressly provides that the FCC has authority to make rules "as may be necessary in the public interest to carry out the provisions of this Act," which now includes the 1996 Act. *Iowa*, 119 S. Ct. at 729-30. The Court thus rejected the lower court's holding that Section 201(b)'s rule of "construction" could permit a court to contort the Act's terms to deny the FCC the authority it plainly had. The Court held that because the FCC was acting to implement provisions of the 1996 Act (Sections 251 and 252) that, under

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[10] Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . " 47 U.S.C. § 152(b).

the settled meaning of its terms, apply to intrastate matters, Section 2(b) was no bar to the FCC's action.

As the Fifth Circuit recognized, this Court's decision in *Iowa* was equally applicable here. As in *Iowa*, Section 201(b) explicitly gives the FCC authority to make rules to implement the provisions of Section 254. See *Iowa*, 119 S. Ct. at 730 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996"). Indeed, in this case the FCC's "jurisdiction" to promulgate rules to implement Section 254 is doubly clear, because Section 254(a) provides an independent, explicit source of rulemaking authority concerning universal service matters.[11] The FCC thus has unambiguous statutory authority to adopt rules implementing every aspect of Section 254, whether it touches on intrastate or interstate matters. See *Iowa*, 119 S. Ct. at 731 (FCC jurisdiction follows where the Act applies).

Despite Sections 201(b) and 254(a), however, the Fifth Circuit held that the FCC has no jurisdiction to adopt the rule

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[11] Section 254(a) provides:

> Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c)of this title a proceeding to recommend changes to any of its regulations in order to implement Sections 214(e)of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms . . . The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board . . . The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms . . .

47 U.S.C. § 254(a).

at issue here because, in the court's view, the substantive provisions of Section 254 do not unambiguously "apply" to intrastate services. See Pet. App. at 107a-110a. (Section 254 "does not explicitly state that the FCC has the responsibility to fund intrastate universal services"). This conclusion is patently incorrect. The terms and structure of Section 254, coupled with decades of regulatory history, make clear that intrastate matters are at the core of almost every aspect of Section 254. It is, if anything, far clearer that Section 254's provisions "apply" to intrastate matters than it was in the case of the provisions of Sections 251 and 252 that were at issue in *Iowa*.

First, Section 254(c) expressly authorizes the FCC to define "universal service" as an "evolving level of telecommunications services" that the FCC is to "establish" periodically." Moreover, "telecommunications service" is expressly defined to include intrastate telecommunications services. See 47 U.S.C. § 153(46). Pursuant to this section, the *Order* established a definition of universal service that includes almost exclusively intrastate services, to be funded by federal mechanisms. No one, including Cincinnati Bell, has challenged that determination. See Pet. App. at 171a-198a. Thus, consistent with its plain terms, the universal service system is at its core a program designed almost exclusively to provide subsidies for intrastate services.

Moreover, in enacting Section 254, Congress was legislating against a backdrop of decades of FCC policy. As shown above, the term "universal service" has always been understood to mean a policy of subsidizing local, intrastate services. See, *e.g.*, *NARUC* v. *FCC*, 737 F.2d 1095, 1108 & n.6 (D.C. Cir. 1984); 47 U.S.C. § 151. The term "universal service" is therefore an established term of art. And it is a "cardinal rule of statutory construction" that, when Congress uses a term of art in a statute, it is intended to have its

established meaning. *Molzof* v. *United States*, 502 U.S. 301, 307-08 (1992); see also *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995); *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 612-13 (1992); *McDermott Int'l Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). Therefore, even in the absence of Section 254(c), Congress's use of the term "universal service" makes clear that Section 254 is unambiguously concerned with intrastate matters.

Section 254 also makes clear that the FCC, and not the state commissions, has the primary responsibility for ensuring universal service, including local, intrastate service. Section 254(d) requires the FCC to establish funding mechanisms that are "sufficient" to "preserve and advance universal service," which, as defined by the FCC, includes almost exclusively intrastate services. Moreover, the language of Section 254(d) is mandatory: "[e]very" carrier offering interstate service "shall" contribute to mechanisms established by the Commission that are "sufficient" to preserve and advance "universal service" (*i.e.*, universally available local telephone service). By contrast, the language of Section 254(f) is clear that state universal service funds are merely supplemental: the state commissions "may" establish additional funds so long as they are "not inconsistent with the Commission's rules" and "do not rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f). Thus, Congress clearly intended the FCC to have the ultimate responsibility for establishing funding mechanisms that are "sufficient," by themselves if necessary, to promote universal service, notwithstanding the inevitable and profound effect such mechanisms would have on intrastate communications.

Section 254's pervasive concern with intrastate matters is further shown by the fact that Section 254(a) requires the FCC to formulate its universal service policies in conjunction with a

Federal-State Joint Board composed of federal and state commissioners. 47 U.S.C. § 254(a).

In short, by requiring the FCC to establish mechanisms that are "sufficient" to preserve "universal service," Section 254 unambiguously requires the FCC to establish and regulate a system of subsidies that stretches across the interstate and intrastate jurisdictions and ensures universally available and affordable *local* telephone service throughout the nation. Because of these unambiguous directives, Section 2(b)'s "jurisdictional fence" simply does not apply in the unique context of universal service policies. As the Commission found in the *Order*, "section 254 blurs any perceived bright line between interstate and intrastate matters." Pet. App. at 220a. In short, Section 254 plainly "applies" to intrastate services.

The Fifth Circuit's contrary conclusion is clear error and, indeed, startling. Pet. App. at 108a-109a. If the FCC had no authority over the intrastate aspects of universal service, the FCC would have essentially no role under Section 254, and most of the provisions of Section 254 would be meaningless. There has never been any purely interstate universal service policy, other than the restrictions on geographic deaveraging of interstate long distance rates that is specially codified in Section 254(g). *Cf.* Pet. App. at 108a-112a. If the Fifth Circuit's broad "'jurisdictional" findings were given full effect, the FCC's longstanding, multibillion dollar subsidy programs would be eradicated at one fell swoop, and full responsibility for all intrastate aspects of universal service would be foisted on the states. That could not have been Congress's intention, and the Fifth Circuit's broad holdings should therefore be reversed.

2. The immediate consequence of the Fifth Circuit's decision is to shift hundreds of millions of dollars of annual

subsidy obligations to carriers that provide a relatively high proportion of interstate services. Although Congress gave the FCC ample authority in Section 254(d) to design federal funding mechanisms that spread the burden across the broadest possible funding base, the Fifth Circuit has made such funding mechanisms impossible, thus forcing the burden of the funding to be concentrated on a smaller set of interstate ratepayers. In doing so, the Fifth Circuit has prevented precisely the sort of broad, equitable, and competitively neutral funding mechanisms that Congress intended. The Fifth Circuit's decision thus has the perverse result of forcing a statutory program devoted almost exclusively to subsidizing of local, intrastate services to be paid for almost exclusively by carriers (and their customers) that provide mostly interstate services.[12]

Apart from the immediate consequences of this case, however, in the long term the Fifth Circuit's sweeping "jurisdictional" rulings are likely to cripple the FCC's ability to enforce other key provisions of Section 254. For example, in the decision below, the Fifth Circuit separately held that the FCC had no authority to promulgate rules establishing eligibility requirements for its own funding mechanisms. Pet. App. at 35a-38a. Under this extraordinary ruling, the state commissions now have exclusive authority to determine when carriers may receive federal funding.

The Fifth Circuit's sweeping holdings also suggest that the FCC may have no rulemaking authority to implement or

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[12] *See also Federal-State Joint Board on Universal Service, Seventh Report and Order and Thirteenth Order on Reconsideration*, 14 FCC Rcd. 8078 (1999) (just prior to the Fifth Circuit's decision, the FCC sought comment on adding intrastate revenues to the assessment base of the high-cost universal service fund, which would have similarly spread the burden of funding for high cost support).

enforce numerous other provisions of Section 254. For example, Section 254(f) provides that state universal service mechanisms may not "rely on or burden" the federal mechanisms. Under the Fifth Circuit's view that Section 254 does not "apply" to intrastate matters, however, the FCC may have no authority to enforce that provision through rules or other action if they even consider -- much less impact -- aspects of a state's universal service fund. Similarly, Section 254(e) provides that "[a] carrier that receives [federal] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." The Fifth Circuit's decision, however, may limit the extent to which the FCC could take action to enforce that provision, because such action may take account of or affect state regulation of the "provision, maintenance, and upgrading" of intrastate services.

In short, the decision below is likely to frustrate the administration of the universal service system in the future. The Fifth Circuit's broad holding that Section 254 does not "apply" to intrastate services will inevitably prevent effective implementation and enforcement of its substantive provisions, which necessarily *do* apply to intrastate services.

Finally, the Fifth Circuit's ruling is all the more ironic because the FCC rule at issue does not actually intrude on the states' jurisdiction, which is perhaps why no state commission challenged the rule. The FCC's rule concerns only the assessment base of the e-rate universal service funds. The assessment base (as opposed to the recovery base of those funds) does not implicate the rates that any carrier charges for intrastate services. The FCC's rule merely uses total telecommunications revenues as a reference point for calculating the amount each carrier must contribute to the fund.

See Pet. App. at 197a-198a.[13] The FCC could have chosen any number of such reference points, such as total number of lines or customers or market capitalization. None of these determinations concerning the assessment base would affect intrastate rates or services, however, because carriers may recover their federal contribution amounts solely through interstate charges.

Indeed, a larger assessment base permits the FCC to adopt a larger fund. This benefits the states because it relieves pressure to fund universal service from state sources. By restricting the assessment base, the decision below will not only have an adverse impact on the FCC and carriers providing primarily interstate services, but ultimately on the states' own efforts to promote universal service for their citizens.

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In sum, the Fifth Circuit's decision appears to be an ill-conceived attempt to solve a federalism "problem" that simply does not exist. The aspect of the FCC order reversed by the court did not alter the traditional division of responsibility between the federal and state governments. If anything, it protected and furthered the states' interests.

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[13] For this reason, the Fifth Circuit's conclusion that the assessment base rule constitutes a charge in connection with intrastate services within the meaning of Section 2(b) is incorrect. See Pet. App. 108a-110a. Unlike the depreciation rates for local telephone equipment at issue in *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355 (1986), the mere fact that the FCC's rule uses intrastate revenues as a reference point for the calculation of these federal assessments does not transform such calculations into a regulation of the charges for or in connection with intrastate communications services.

By reversing that order on the ground that Section 254 does not "apply" to intrastate matters, the Fifth Circuit has not only failed to protect the interests of the states and their rate-paying citizens, it has also hampered the FCC's ability to administer its universal service systems in an equitable manner. At the same time, it has unfairly forced customers of primarily interstate carriers such as AT&T and MCI WORLDCOM to shoulder a much larger share of the financial responsibility for the "e-rate" portion of the FCC's universal service program -- a multibillion dollar program devoted almost entirely to subsidizing local, intrastate services. Moreover, the Fifth Circuit did so by adopting the same unlawful construction of § 2(b) that was rejected in last Term's *Iowa* decision, and the Fifth Circuit thereby denied the FCC the authority that it plainly has in view of the text, structure, and regulatory history of Section 254. This Court's review is plainly warranted.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

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